

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

CLIFFORD WAYNE WOODALL,)
individually and as representative of the)
ESTATE OF HENRY WAYNE)
WOODALL; and SHARON G.)
WOODALL KING,)

Respondents,

V.

AVALON CARE CENTER – FEDERAL
WAY, LLC,

Appellant.

No. 62894-1-I

DIVISION ONE

PUBLISHED IN PART

FILED: May 10, 2010

Cox, J. — Avalon Care Center – Federal Way, LLC (“Avalon”), appeals an order denying in part its motion to compel arbitration of all claims asserted in this survival and wrongful death action. The wrongful death claims are based on statutory causes of action for the benefit of the heirs of Henry Woodall. These heirs did not agree to arbitrate their wrongful death claims. Moreover, there is no basis to require them to arbitrate these claims. We affirm.¹

¹ Pursuant to RAP 3.4, we direct the parties and the clerks of this court and the superior court to modify the caption on pleadings filed after the filing of this opinion to reflect that the plaintiff is “Clifford Wayne Woodall, as representative of the Estate of Henry Wayne Woodall.” This directive is based on our grant of the unopposed motion to dismiss, as plaintiffs, Clifford Wayne Woodall, individually, and Sharon G. Woodall King, individually.

On October 6, 2006, Henry Woodall was admitted to a facility run by Avalon that provides skilled nursing care. At the time of his admission, Henry² and Avalon executed a “Resident and Facility Arbitration Agreement.” The agreement provides for arbitration of all disputes and claims for damages arising from personal injury or medical care.

Henry died on July 28, 2007. Clifford Woodall and Sharon Woodall King are the children of Henry and his sole heirs (collectively, “the heirs”). Clifford is the personal representative of Henry’s estate.

Clifford, individually and as the representative of the estate, and Sharon King, individually, brought this action against Avalon under the wrongful death and survival statutes. They seek damages, attorney fees, and other relief.

Avalon moved to compel arbitration and to stay these court proceedings pending the outcome of the arbitration of all claims. The trial court ultimately granted Avalon’s motion to compel arbitration in part and denied it in part. The court concluded that the survival claims should be resolved through the contractually agreed arbitration process. But the court also concluded that the arbitration agreement did not apply to the wrongful death claims of the heirs. The trial court expressed its reluctance to split the proceedings to resolve the survival and wrongful death claims, stating that litigation “in two separate forums is inefficient, unfair and exposes [all parties] to the inherent danger of conflicting outcomes based on the same set of intertwined facts.” Nevertheless, the court

² We adopt the parties’ use of first names for clarity.

concluded that case and statutory authorities required this result.

Avalon appeals.³

ARBITRABILITY OF WRONGFUL DEATH CLAIMS

Avalon argues that the arbitration agreement between Henry and Avalon binds the heirs to arbitrate their wrongful death claims against Avalon. We disagree.

Whether a person is bound by an agreement to arbitrate is a legal question that is to be determined by the courts.⁴ “While a strong public policy favoring arbitration is recognized under both federal and Washington law, ‘arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.’”⁵

There are limited exceptions to the general rule that one who does not sign an arbitration agreement cannot be compelled to arbitrate.⁶ “For instance, a nonsignator is bound by the terms of an arbitration agreement where the nonsignator's claims are asserted solely on behalf of a signator to the arbitration

³ RAP 2.2(a)(3); Stein v. Geonerco, Inc., 105 Wn. App. 41, 43-44, 17 P.3d 1266 (2001); Herzog v. Foster & Marshall, Inc., 56 Wn. App. 437, 445, 783 P.2d 1124 (1989); RCW 7.04A.280(1)(a).

⁴ RCW 7.04A.060(2); Satomi Owners Ass’n v. Satomi, LLC, 167 Wn.2d 781, 809, 225 P.3d 213 (2009) (citing First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944-45, 115 S. Ct. 1920, 131 L. Ed. 2d 985 (1995)); Townsend v. Quadrant Corp., 153 Wn. App. 870, 881, 224 P.3d 818 (2009).

⁵ Satomi, 167 Wn.2d at 810 (internal citations and quotation marks omitted) (quoting Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83, 123 S. Ct. 588, 154 L. Ed. 2d 491 (2002)).

⁶ Id.

agreement.”⁷ “In addition, federal courts have held, and the Washington Court of Appeals has recognized, that ‘[n]onsignatories of arbitration agreements may be bound by the agreement under ordinary contract and agency principles.’”⁸ Among these principles are (1) incorporation by reference; (2) assumption; (3) agency; (4) veil-piercing/alter ego; and (5) estoppel.⁹

Arbitrability is a question of law that we review de novo.¹⁰ The burden of proof of showing that the arbitration agreement is unenforceable is on the party seeking to avoid arbitration.¹¹

Here, the arbitration agreement that Henry and Avalon signed states:

RESIDENT AND FACILITY ARBITRATION AGREEMENT

⁷ Id. (citing Quackenbush v. Allstate Ins. Co., 121 F.3d 1372, 1380-82 (9th Cir. 1997) (requiring claims of California insurance commissioner, asserted as trustee on behalf of insolvent reinsureds to recover insurance proceeds, to be arbitrated where reinsurance agreements contained arbitration clauses); Clay v. Permanente Med. Group, Inc., 540 F. Supp. 2d 1101, 1110 (N.D. Cal. 2007) (holding plaintiffs were bound by terms of agreement, including arbitration provisions, entered by decedent, where plaintiffs brought claims on behalf of decedent's estate); SouthTrust Bank v. Ford, 835 So.2d 990, 993-94 (Ala. 2002) (holding estate administrator asserting claim on behalf of estate ‘stands in the [decedent’s] shoes’ and is bound to arbitrate claim as the signator decedent would have been had he asserted claim himself)).

⁸ Satomi, 167 Wn.2d at 811 n.22 (alteration in original) (internal quotation marks omitted) (quoting Comer v. Micor, Inc., 436 F.3d 1098, 1101 (9th Cir. 2006)) (citing Powell v. Sphere Drake Ins. PLC, 97 Wn. App. 890, 892, 988 P.2d 12 (1999)).

⁹ Id. (quoting Mundi v. Union Sec. Life Ins. Co., 555 F.3d 1042, 1045 (9th Cir. 2009); Powell, 97 Wn. App. at 895-96 (citing Thomson-CSF, SA v. Am. Arbitration Ass’n, 64 F.2d 773, 776 (2d Cir. 1995)).

¹⁰ Satomi, 167 Wn.2d at 797; RCW 7.04A.280(1)(a); Stein, 105 Wn. App. at 45.

¹¹ Satomi, 167 Wn.2d at 797; Stein, 105 Wn. App. at 48.

(Not a Condition of Admission – Please Read Carefully)

. . .

. . . We agree to submit to binding arbitration for all disputes and claims for damages of any kind for injuries and losses arising from the medical care rendered or which should have been rendered after the date of this Agreement. All alleged claims for monetary damages against the facility, its owners, lessees, management organization, or their employees, officers, directors, agents, must be arbitrated including, without limitation, claims for personal injury from alleged negligence, gross negligence, malpractice, or any alleged claims based on any departure from accepted medical or health care or safety standards, emotional distress or punitive damages.^[12]

The agreement further provides:

We expressly intend that this Agreement shall bind all persons whose alleged claims for injuries or losses arise out of care rendered by the Facility or which should have been rendered by Facility after the date of this Agreement, including any spouse, children, or heirs of the Resident or Executor of the Resident's estate.^[13]

It is undisputed that Henry and Avalon were the only persons who signed the arbitration agreement. The heirs did not. Thus, the legal question is whether the heirs are required to arbitrate their wrongful death claims against Avalon where they were not parties to the agreement to arbitrate.

We begin our analysis by considering our supreme court's recent observation in Satomi Owners Association v. Satomi, LLC¹⁴ that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any

¹² Clerk's Papers at 32.

¹³ Id.

¹⁴ 167 Wn.2d 781, 225 P.3d 213 (2009).

dispute which he [or she] has not agreed so to submit.”¹⁵ The court stated this long-standing principle of contract law notwithstanding its acknowledgement that there is a strong public policy favoring arbitration recognized under both federal and state law.¹⁶

The court went on to identify “certain limited exceptions” to the general rule that a person who is not a party to an arbitration agreement may not be bound by such agreement.¹⁷ It also identified a group of cases where federal courts have held, and this court has recognized, that a person who has not agreed to arbitrate may be bound to arbitrate based on ordinary contract and agency principles.¹⁸ Applying agency principles in one of the consolidated cases in Satomi, the supreme court held a condominium association was bound to arbitrate based on arbitration agreements signed only by its members, where the association asserted claims of its members.¹⁹

Avalon does not rely on either the Quackenbush v. Allstate Insurance Co.²⁰ or SouthTrust Bank v. Ford²¹ line of cases that Satomi cites as examples of

¹⁵ Id. at 810 (internal quotation marks omitted) (quoting Howsam, 537 U.S. at 83).

¹⁶ See id.

¹⁷ Satomi, 167 Wn.2d at 810-11.

¹⁸ Id. at 810-11, 811 n.22.

¹⁹ Id. at 808-13.

²⁰ 121 F.3d 1372 (9th Cir. 1997).

²¹ 835 So.2d 990 (Ala. 2002).

the “certain limited exceptions” to the general rule.²² Quackenbush was a case where the rights asserted were on behalf of persons who signed arbitration agreements.²³ Ford involved claims on behalf of an estate’s claims.²⁴ These two cases are factually distinguishable from this case. The wrongful death claims here are asserted on behalf of the heirs, neither of whom signed the arbitration agreement between Henry and Avalon.

Avalon relies on Clay v. Permanente Medical Group, Inc.²⁵ Clay is the third case the Satomi court cited as an example of the limited exceptions to the general rule.

That federal case, based on California law, determined that the plaintiffs were bound to an arbitration provision they did not sign because they asserted claims on behalf of the decedent’s estate, among other reasons.²⁶ Here, the heirs assert wrongful death claims, which are not on behalf of Henry’s estate, against Avalon under Washington’s wrongful death statutes. Clay is distinguishable.

²² Satomi, 167 Wn.2d at 810.

²³ Id. (citing Quackenbush, 121 F.3d at 1380-82).

²⁴ Id. at 810-11 (citing Ford, 835 So.2d at 993-94).

²⁵ 540 F. Supp. 2d 1101 (N.D. Cal. 2007); Opening Brief of Appellant at 17.

²⁶ Clay, 540 F. Supp. 2d at 1110 (“Because Mr. Clay agreed to the terms of the [coverage contract including an arbitration provision], his estate is bound by its terms. Therefore, the various causes of action in the Complaint which are brought on behalf of the estate must be submitted to arbitration.”); Satomi, 167 Wn.2d at 810 (citing Clay, 540 F. Supp. 2d at 1110).

We note also that Clay identifies a split of authority in California Court of Appeals cases over the question of binding persons who are not parties to an arbitration agreement to arbitrate claims:

Plaintiffs correctly identify a split in the California Courts of Appeals regarding the applicability of binding arbitration provisions to non-signatory adult heirs. Two lines of cases may apply. The first follows Rhodes v. California Hospital Medical Center, 76 Cal. App. 3d 606, 143 Cal. Rptr. 59 (1978); the second follows Herbert v. Superior Court of Los Angeles County, 169 Cal. App. 3d 718, 215 Cal. Rptr. 477 (1985). Though Plaintiffs identify the split, they fail to provide any reason the Court should follow one line of cases over the other in this matter.^[27]

Because there is a split of authority within the California Court of Appeals on the question before us, Clay is not helpful in deciding this case. Moreover, the California Supreme Court has not, as of this writing, resolved this conflict within the lower appellate court.²⁸

Avalon does not identify any contract or agency principles that would bind the heirs to arbitrate based on the agreement between Avalon and Henry. Likewise, we are unaware of any such principles that would apply to this case.

Avalon also relies on Estate of Eckstein v. Life Care Centers of America, Inc.²⁹ and Townsend v. Quadrant Corp.³⁰ In Life Care Centers, the decedent's

²⁷ Clay, 540 F. Supp. 2d at 1111.

²⁸ Ruiz v. Podolsky, 175 Cal. App. 4th 227, 95 Cal. Rptr. 3d 828 (2009), review granted and opinion superseded by 218 P.3d 261, 101 Cal. Rptr. 3d 1 (2009).

²⁹ 623 F. Supp. 2d 1235 (E.D. Wash. 2009).

³⁰ 153 Wn. App. 870, 224 P.3d 818 (2009).

attorney-in-fact had executed an arbitration agreement on the decedent's behalf upon her admission to defendant Life Care Center.³¹ The United States District Court for the Eastern District of Washington granted the defendants' motion to compel arbitration of all claims, including wrongful death claims brought on behalf of statutory beneficiaries.³² The court recognized that "there are no Washington cases specifically on point" and appears to have relied on a limited search of authorities in other states.³³

But, as Woodall points out, other out-of-state authority can be read to support the conclusion that wrongful death claims are not subject to a decedent's arbitration agreement. In Lawrence v. Beverly Manor,³⁴ for example, the Supreme Court of Missouri held that the adult children of a nursing home resident were not bound by the resident's arbitration agreement with the home.³⁵ The arbitration agreement there purported to bind any claim "derived through" the resident's claims.³⁶ Recognizing that Missouri's wrongful death act creates a new cause of action, that wrongful death "is a cause of action distinct from any underlying tort claims," and that a wrongful death claim "does not belong to the deceased or even a decedent's estate," the court concluded that the arbitration

³¹ Life Care, 623 F. Supp. 2d at 1236.

³² Id. at 1239-41.

³³ Id. at 1239-40

³⁴ 273 S.W.3d 525 (Mo. 2009).

³⁵ Id. at 530.

³⁶ Id. at 526.

agreement could not bind the parties in a wrongful death suit.³⁷

Similarly, in Peters v. Columbus Steel Castings Co.,³⁸ the Supreme Court of Ohio held that the wrongful death claim of a wife, who was administrator of her husband's estate, against her husband's employer was not subject to the decedent's arbitration agreement with his employer.³⁹ The court relied on two "longstanding" principles of law: "(1) only signatories to an arbitration agreement are bound by its terms and (2) a survival action brought to recover for a decedent's own injuries before his or her death is independent from a wrongful-death action seeking damages for the injuries that the decedent's beneficiaries suffer as a result of the death, even though the same nominal party prosecutes both actions."⁴⁰ In sum, the decedent's agreement was an agreement "to arbitrate *his* claims against the company," and thus the provision in the agreement binding the decedent's heirs applied to a survival action.⁴¹ But the decedent could not "restrict his beneficiaries to arbitration of their wrongful-death claims because he held no right to those claims."⁴²

Avalon also cites Townsend, a decision from this court.⁴³ Avalon appears

³⁷ Id. at 527-28.

³⁸ 115 Ohio St. 3d 134, 873 N.E.2d 1258 (2007).

³⁹ Id. at 135, 138-39.

⁴⁰ Id. at 136.

⁴¹ Id. at 138.

⁴² Id.

⁴³ 153 Wn. App. 870.

to rely on the portion of that opinion in which we concluded that the two defendant parent corporations, nonsignatories to an arbitration agreement executed by their subsidiary, could enforce the arbitration clause.⁴⁴ In so concluding, we recognized the principle that a person not a party to an agreement to arbitrate may be bound to the agreement by ordinary principles of contract and agency.⁴⁵ Townsend does not change our analysis here. The issue in this case does not have anything to do with corporate parent/subsidiary relationships. Moreover, the claims here are not “inherently inseparable.”⁴⁶

Based on the above analysis, we conclude that Avalon has failed to establish that the heirs are bound to arbitrate their wrongful death claims against Avalon under any of the limited exceptions to the general rule that the Satomi court identified. Moreover, the conflicting authorities in other jurisdictions are not dispositive in deciding the arbitrability question under Washington law.

Avalon relies on another argument to urge that the heirs are bound to arbitrate under an agreement they did not sign. That argument is based on its characterization of the wrongful death claims as “derivative.”⁴⁷ This is unpersuasive.

Examination of the nature of the claims asserted in this action is helpful in

⁴⁴ Appellant’s Statement of Additional Authorities at 1 (quoting Townsend, 153 Wn. App. at 889).

⁴⁵ Townsend, 153 Wn. App. at 889.

⁴⁶ See id.

⁴⁷ Opening Brief of Appellant at 8-12.

addressing this argument. Survival actions and wrongful death actions, though often brought together, are conceptually distinct.⁴⁸ “The wrongful death statute, RCW 4.20.010, provides that when the death of a person is caused by the wrongful act of another, his personal representative may maintain an action for damages against the person causing the death.”⁴⁹ The wrongful death statutes “create new causes of action for the benefit of specific surviving relatives to compensate for losses caused to them by the decedent’s death.”⁵⁰ Our supreme court has explained that in this context, the personal representative of the estate “is merely a statutory agent or trustee acting in favor of the class designated in the statute, with no benefits flowing to the estate of the injured deceased.”⁵¹ In other words, “[u]nder no circumstances does the estate of the decedent benefit by the [wrongful death] action. Anything realized therefrom goes to the beneficiaries. A cause of action for wrongful death is not one which ever belonged to the decedent.”⁵²

In contrast, Washington’s general survival statute, RCW 4.20.046(1), does not create a separate claim for the decedent’s survivors, but merely

⁴⁸ Federated Servs. Ins. Co. v. Pers. Representative of Estate of Norberg, 101 Wn. App. 119, 126, 4 P.3d 844 (2000).

⁴⁹ Tait v. Wahl, 97 Wn. App. 765, 768-69, 987 P.2d 127 (1999) (quoting Long v. Dugan, 57 Wn. App. 309, 311, 788 P.2d 1 (1990)).

⁵⁰ Federated Servs., 101 Wn. App. at 126 (citing RCW 4.20.010, 4.24.010; Gray v. Goodson, 61 Wn.2d 319, 325, 378 P.2d 413 (1963)).

⁵¹ Gray, 61 Wn.2d at 327.

⁵² Id. (quoting Maciejczak v. Bartell, 187 Wash. 113, 60 P.2d 31 (1936)).

preserves the causes of action a person could have maintained had he or she not died.⁵³ Stated differently, the survival statute “allows the decedent’s existing causes of action to survive and continue ‘as an asset of his estate.’”⁵⁴

Therefore, unlike the wrongful death statute, the decedent’s personal representative may recover damages under RCW 4.20.046(1) on behalf of the decedent’s estate.⁵⁵

The trial court correctly applied these principles to this case. The court granted Avalon’s motion to compel arbitration to the extent of the survival claims. These claims are an asset of Henry’s estate. They originated as Henry’s “existing causes of action” which survived his death and “continue[d] ‘as an asset of his estate.’”⁵⁶ Accordingly, Clifford may assert these claims against Avalon as personal representative of Henry’s estate.⁵⁷ Under the ordinary contract principle of agency, Avalon may properly require those claims to be arbitrated under its agreement with Henry.⁵⁸

⁵³ Tait, 97 Wn. App. at 772 (quoting Cavazos v. Franklin, 73 Wn. App. 116, 119, 867 P.2d 674 (1994)).

⁵⁴ Federated Servs. Ins., 101 Wn. App. at 126 (quoting Warner v. McCaughan, 77 Wn.2d 178, 179, 460 P.2d 272 (1969)).

⁵⁵ Tait, 97 Wn. App. at 772.

⁵⁶ Federated Servs., 101 Wn. App. at 126 (quoting Warner, 77 Wn.2d at 179).

⁵⁷ See Tait, 97 Wn. App. at 772.

⁵⁸ See Satomi, 167 Wn.2d at 811 n.22, 808-13 (condominium association was bound to arbitrate based on arbitration agreements signed only by its members, whose claims the association asserted).

In addition, the court correctly denied the motion to the extent of the wrongful death claims asserted by the heirs against Avalon. These claims are exclusively for the benefit of the heirs.⁵⁹ The wrongful death statutes “create **new** causes of action” meant to compensate surviving relatives “for losses caused **to them** by the decedent’s death.”⁶⁰ No benefits of a wrongful death claim flow to the estate.⁶¹ Nor did the cause of action ever belong to the decedent.⁶²

The personal representative of Henry’s estate is authorized to commence this action as the nominal party for the survival action.⁶³ The personal representative is also the exclusive statutory agent to bring the wrongful death claims on behalf of the heirs.⁶⁴ But the scope of the personal representative’s authority in this latter capacity does not extend to arbitration of the wrongful death claims.

Avalon claims that the heirs must arbitrate their claims because wrongful death claims are “derivative.” The answer to this is simple. In Johnson v. Ottomeier,⁶⁵ the supreme court explained, “[T]he action for wrongful death is

⁵⁹ Id.

⁶⁰ Federated Servs. Ins., 101 Wn. App. at 126 (emphasis added) (citing Gray, 61 Wn.2d at 325).

⁶¹ Gray, 61 Wn.2d at 327.

⁶² Id. (quoting Maciejczak, 187 Wash. 113).

⁶³ RCW 4.20.046.

⁶⁴ RCW 4.20.010, .020.

⁶⁵ 45 Wn.2d 419, 275 P.2d 723 (1954).

derivative ***only in the sense that it derives from the wrongful act causing the death***, rather than from the person of the deceased.”⁶⁶ Thus, the wrongful death claims here are derived from the allegedly wrongful acts of Avalon, not from Henry. In short, characterizing the wrongful death claims as “derivative” does not support the proposition that the heirs must arbitrate their claims for wrongful death.

Avalon relies heavily on Ginochio v. Hesston Corp.⁶⁷ There, Division Three of this court concluded that the 1981 version of former RCW 4.22.020 required a trial court to reduce the award for a wrongful death claim by the decedent’s contributory fault.⁶⁸ That was a statutory interpretation case in which the former statute expressly stated that “***the contributory fault of the decedent shall be imputed to the claimant in [a wrongful death action]***.”⁶⁹ Avalon contends that the court in Ginochio “held that since wrongful death claims are derivative, the decedent’s fault should be imputed to reduce the wrongful death award.”⁷⁰ While Ginochio discusses the derivative nature of wrongful death claims, its holding primarily relies on the above-quoted language of the statute.⁷¹

⁶⁶ Johnson v. Ottomeier, 45 Wn.2d 419, 423, 275 P.2d 723 (1954) (emphasis added).

⁶⁷ 46 Wn. App. 843, 733 P.2d 551 (1987).

⁶⁸ Id. at 847-48.

⁶⁹ Id. at 844 (boldface added).

⁷⁰ Opening Brief of Appellant at 12.

⁷¹ See Ginochio, 46 Wn. App. at 845-48 (discussing the legislature’s reasons for treating wrongful death claims differently than other independent causes of action in enacting a statute that imputed contributory fault to wrongful

It does nothing to alter the supreme court's characterization of the term "derivative" in Johnson. More importantly, it is not helpful in addressing the issue before us: whether the heirs are bound to arbitrate under an agreement they did not sign under the principles articulated in Satomi.

Avalon cites three areas of law unrelated to the question of arbitrability of claims that is before us to support its position: that wrongful death claimants are bound by enforceable liability releases, that this court "treats uniquely wrongful death claims," and that the Industrial Insurance Act bars private claims by heirs and beneficiaries. None of these areas are helpful here.

Neither case Avalon cites on the issue of liability releases addresses the principles discussed in Satomi.⁷² Thus, they are not helpful.

The case Avalon cites to show that Washington treats wrongful death claims "uniquely" was decided on a statutory basis not relevant here.⁷³ Likewise, it does not address the principles stated in Satomi.

Finally, the bar on beneficiaries' claims under the Industrial Insurance

death claims).

⁷² See Hewitt v. Miller, 11 Wn. App. 72, 521 P.2d 244 (1974) (wrongful death action barred because release of liability signed by student at scuba diving class was not contrary to public policy); Boyce v. West, 71 Wn. App. 657, 862 P.2d 592 (1993) (wrongful death action barred because release of liability signed by student at scuba diving class covered the instructor as an employee, the release did not violate public policy, and plaintiff presented insufficient evidence to defeat summary judgment that instructor was grossly negligent).

⁷³ Atchison v. Great Western Malting Co., 161 Wn.2d 372, 166 P.3d 662 (2007) (holding that the minority of a wrongful death beneficiary does not toll the statute of limitations for wrongful death claims because the statutory scheme grants the PR, not the beneficiary, the right to sue).

Act, title 51 RCW, is also entirely statutory.⁷⁴ That statutory framework is not helpful in deciding whether the heirs in this case are bound to arbitrate their wrongful death claim.

Avalon makes two policy arguments: first, actions based on the same set of facts should be litigated in the same forum to preserve fairness and judicial efficiency;⁷⁵ second, Washington's strong policy favoring arbitration requires that we conclude that the wrongful death claims should be subject to the arbitration agreement just as the survival claims are.⁷⁶

Both policy arguments are addressed by the rules stated in Satomi. The trial court reluctantly concluded that the claims had to be split into two forums. But, as the Satomi court observed, arbitration is a matter of contract.⁷⁷ As an important policy of contract, one who has not agreed to arbitrate cannot generally be required to do so.⁷⁸ The strong policy favoring arbitration does not overcome the policy that one who is not a party to an agreement to arbitrate cannot generally be required to arbitrate.

⁷⁴ See RCW 51.04.010 ("sure and certain relief for workers, injured in their work, and their families and dependents is hereby provided regardless of questions of fault **and to the exclusion of every other remedy, proceeding or compensation**, except as otherwise provided in this title" (emphasis added)).

⁷⁵ Opening Brief of Appellant at 12-13 (citing State v. Dent, 123 Wn.2d 467, 484, 869 P.2d 392 (1994) (discussing trial court's decision to deny severance where two defendants were convicted at joint trial)).

⁷⁶ Id. at 14 (citing Munsey v. Walla Walla College, 80 Wn. App. 92, 94-95, 906 P.2d 988 (1995)).

⁷⁷ Satomi, 167 Wn.2d at 810 (quoting Howsam, 537 U.S. at 83).

⁷⁸ See id.

The additional cases that Avalon discusses in its reply are also not persuasive of a different result. Both the Michigan Court of Appeals in Ballard v. Southwest Detroit Hospital⁷⁹ and the Supreme Court of Texas in In re Labatt Food Service, LP⁸⁰ relied on the language of their states' wrongful death statutes, which expressly conditioned beneficiaries' claims on the decedent's right to maintain his or her suit for injuries.⁸¹ The Michigan wrongful death act "establishes a cause of action where the defendant's negligence or wrongful act would 'if death had not ensued, have entitled the party injured to maintain an action and recover damages.'"⁸² The Texas statute had an equivalent provision.⁸³ Both courts stated that the right to bring an action under these statutes was "derivative" of the decedent's right to have sued for his or own injuries immediately prior to his death.⁸⁴

The Michigan Court of Appeals decided that an appointed PR "is bound by the arbitration agreement to the same extent the decedent would have been

⁷⁹ 119 Mich. App. 814, 327 N.W.2d 370 (1982).

⁸⁰ 279 S.W.3d 640 (Tex. 2009).

⁸¹ See Ballard, 119 Mich. App. at 817-18; In re Labatt, 279 S.W.3d at 644.

⁸² Ballard, 119 Mich. App. at 817-18 (quoting Mich. Comp. Laws § 600.2922(1)).

⁸³ In re Labatt, 279 S.W.3d at 644 (Wrongful death beneficiaries may pursue a cause of action "only if the individual injured would have been entitled to bring an action for the injury if the individual had lived." (quoting Tex. Civ. Prac. & Rem. Code § 71.003(a))).

⁸⁴ Id. (characterizing the claim as "entirely derivative"); Ballard, 119 Mich. App. at 818 (wrongful death cause of action "expressly made derivative of the decedent's rights").

bound had she survived.”⁸⁵ But because that court ultimately held the arbitration agreement unenforceable for other reasons,⁸⁶ its decision could be characterized as dicta.⁸⁷ The Supreme Court of Texas held that the beneficiaries were required to arbitrate their wrongful death action because the decedent would have been compelled to arbitrate his claims under his agreement immediately prior to his death.⁸⁸

Unlike the statutes at issue in Ballard and In re Labatt, Washington’s wrongful death statutes do not expressly condition a beneficiary’s wrongful death claims on the decedent’s right to maintain a suit for injuries.⁸⁹ In view of that difference, wrongful death claims in Washington are not “derivative” in the same sense as was discussed in those cases.

We conclude that Henry’s heirs are not required to arbitrate their wrongful death claims against Avalon. They did not sign the agreement to arbitrate. Moreover, they are not bound to arbitrate by any of the recognized exceptions to the general rule that a nonsignatory to an agreement to arbitrate cannot be required to arbitrate.

We affirm the trial court’s order denying the motion to compel arbitration

⁸⁵ Ballard, 119 Mich. App. at 818-19.

⁸⁶ Id. at 819.

⁸⁷ See Pedersen v. Klinkert, 56 Wn.2d 313, 317, 352 P.2d 1025 (1960) (dicta is language not necessary to the decision in a particular case).

⁸⁸ In re Labatt, 279 S.W.3d at 649.

⁸⁹ RCW 4.20.010, .020.

of the wrongful death claims by the heirs against Avalon.

The balance of this opinion has no precedential value. Accordingly, pursuant to RCW 2.06.040, it shall not be published.

DISCRETIONARY REVIEW

Clifford moved for discretionary review of orders entered on December 17, 2008, and February 4, 2009, based on RAP 2.3(b)(2).⁹⁰

We may accept discretionary review under RAP 2.3(b)(2) when “[t]he superior court has committed probable error and the decision of the superior court substantially alters the status quo.”⁹¹ Orders pertaining to arbitration are among the types of orders that fall within the scope of this rule.⁹²

Here, only Clifford seeks review, although the capacity in which he does so is unclear from his motion. Later in this opinion we dismiss Clifford, in his personal capacity, from this action based on Avalon’s unopposed motion to dismiss. Accordingly, we assume for purposes of our analysis that he seeks review solely in his capacity as the personal representative of Henry’s estate in pursuit of the survival claims against Avalon.

The 2nd Order RE: Motion to Compel Arbitration, entered on December 17, 2008, states the court’s ruling on reconsideration of its prior order of

⁹⁰ Motion for Discretionary Review and Response to the Court’s RAP 2.2(A) Motion at pages 3 to 4 of this unnumbered document.

⁹¹ RAP 2.3(b)(2).

⁹² See Geoffrey Crooks, Discretionary Review of Trial Court Decisions under the Washington Rules of Appellate Procedure, 61 Wash. L. Rev. 1541, 1545-46 (1986).

November 12, 2008.⁹³ The decision directs arbitration of the survival claims and pursuit of the wrongful death claims in court.

The Order Granting Motion to Clarify Court's Order of December 17, 2008 On Defendant's Motion to Compel Arbitration, entered on February 4, 2009, clarifies certain matters respecting the court's December 17 order.⁹⁴ The clarification includes a specification of the documents the court considered in making its ruling and explains why the court did not grant an evidentiary hearing.

Clifford challenges both orders on the basis that the trial court committed probable error. Specifically, he claims that the arbitration agreement that Henry signed is both substantively and procedurally unconscionable.

Substantive Unconscionability

Clifford claims that the arbitration agreement is substantively unconscionable solely because he cannot afford the expense of arbitration.

An agreement to arbitrate is "valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of [a] contract."⁹⁵

An arbitration agreement may be substantively unconscionable if it "triggers costs effectively depriving a plaintiff of limited pecuniary means of a forum for vindicating claims."⁹⁶ Substantive unconscionability alone is sufficient

⁹³ Motion for Discretionary Review, Ex. A.

⁹⁴ Motion for Discretionary Review, Ex. B.

⁹⁵ RCW 7.04A.060(1).

⁹⁶ Mendez v. Palm Harbor Homes, Inc., 111 Wn. App. 446, 464, 45 P.3d 594 (2002).

to support a finding of unconscionability.⁹⁷ The existence of an unconscionable bargain is a question of law for the courts.⁹⁸

In Adler v. Fred Lind Manor,⁹⁹ the supreme court considered whether a fee-splitting provision in an arbitration agreement was substantively unconscionable.¹⁰⁰ Citing the companion case Zuver v. Airtouch Communications, Inc.,¹⁰¹ the court stated that “where . . . a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs.”¹⁰² Zuver also adopted the method articulated by the court of appeals in Mendez v. Palm Harbor Homes, Inc.¹⁰³ by which a claimant meets the burden of showing that arbitration would be prohibitively expensive.¹⁰⁴ That approach included submission of an affidavit describing Mendez’s personal finances as well as fee information concerning the anticipated expenses of

⁹⁷ Adler v. Fred Lind Manor, 153 Wn.2d 331, 346-47, 103 P.3d 773 (2004).

⁹⁸ Id. at 344.

⁹⁹ 153 Wn.2d 331, 103 P.3d 773 (2004).

¹⁰⁰ Id. at 352-54.

¹⁰¹ 153 Wn.2d 293, 103 P.3d 753 (2004).

¹⁰² Adler, 153 Wn.2d at 353 (quoting Green Tree Fin. Corp. v. Randolph, 531 U.S. 79, 92, 121 S. Ct. 513, 148 L. Ed. 2d 373 (2000)).

¹⁰³ 111 Wn. App. 446, 45 P.3d 594 (2002).

¹⁰⁴ Zuver, 153 Wn.2d at 309 (citing Mendez, 111 Wn. App. 446); Adler, 153 Wn.2d at 353 (citing Mendez, 111 Wn. App. at 467-68).

arbitration.¹⁰⁵

The Adler court concluded that Adler failed to meet his burden to show that the agreement's fee-splitting provision was substantively unconscionable.¹⁰⁶ Nevertheless, the court also stated, "Although Adler has failed to meet his burden, we hesitate to reach a final decision about the substantive conscionability of the agreement's fee- splitting provision."¹⁰⁷ The court remanded the case, stating,

Adler should have the opportunity to prove that the costs of arbitration would prohibit him from vindicating his claims. Therefore, on remand the trial court should provide the parties with the opportunity to engage in limited discovery regarding the costs of arbitration. On remand, "[o]nce prohibitive costs are established, the opposing party [Fred Lind Manor] must present contrary offsetting evidence to enforce arbitration." Mendez, 111 Wn. App. at 470. Such evidence may include an offer to pay all or part of the arbitration fees and costs.^[108]

Here, the arbitration agreement provides for the selection of a neutral arbitrator and that each party "shall equally share in the expenses of the neutral arbitrator."¹⁰⁹ After selection of a neutral arbitrator, "the Resident shall select one arbitrator and the Facility shall select one arbitrator."¹¹⁰ The agreement further provides, "The Resident and Facility shall pay the fees and expenses of

¹⁰⁵ Adler, 153 Wn.2d at 353 (citing Mendez, 111 Wn. App. at 467-68).

¹⁰⁶ Id.

¹⁰⁷ Id.

¹⁰⁸ Id. at 354.

¹⁰⁹ Clerk's Papers at 32.

¹¹⁰ Id.

their own selected arbitrator.”¹¹¹

Clifford submitted a declaration to the trial court that stated, in relevant part:

My only means of support is the following: social security, which is currently \$1358 per month; and a disability pension of \$1683 per month through the state of Washington.

. . .

I cannot afford to pay an arbitrator’s fees in the matter. I use the entirety of my limited income for my support and medical bills and there is nothing left over to pay an arbitrator. Requiring me to arbitrate this case prevents me from bringing the case at all because I cannot pay an arbitrator’s fees.^[112]

He also submitted a declaration of an attorney with knowledge of arbitration expenses that the customary hourly rate for arbitrators in the county for cases like this would likely be in excess of \$350 per hour.¹¹³

Neither of the orders that Clifford challenges contains any express resolution of this claim that the fee-splitting provision in this arbitration agreement is substantively unconscionable. But we may affirm the decision of the trial court on any basis clearly supported by the record.¹¹⁴

Avalon argues, as it did below, that Clifford failed in his burden to show

¹¹¹ Id. at 33.

¹¹² Id. at 68-69.

¹¹³ Id.

¹¹⁴ Mendez, 111 Wn. App. at 461 (we may affirm a trial court on any theory supported by the record and the legal authorities even if the trial court did not consider or mainly consider such grounds (citing LaMon v. Butler, 112 Wn.2d 193, 200-01, 770 P.2d 1027 (1989); Wendle v. Farrow, 102 Wn.2d 380, 382, 686 P.2d 480 (1984))).

that arbitration is prohibitively expensive. Specifically, his declaration is limited to his personal finances. There is no evidence of the resources of Henry's estate, the beneficiary of any successful survival claims.

This lack of evidence is a tenable basis for the trial court's implicit rejection of the argument that prohibitive cost should bar arbitration of the survival claims. Clifford is a party to this action solely as the personal representative of Henry's estate, not individually. Thus, evidence of the resources of Henry's estate is highly relevant to the question of prohibitive expense. In short, the lack of any evidence of the estate's resources supports the conclusion that Clifford failed to meet his burden under the Mendez standard.

While Clifford relies on the Mendez court approving a statement of personal finances as proof of prohibitive expense, that case is factually distinguishable. Mendez asserted a claim that was personal to him.¹¹⁵ Here, Clifford does not assert a claim that is personal to him. Rather, he asserts the claim solely in his capacity as the personal representative of Henry's estate. Thus, a statement of Clifford's personal finances is insufficient, under these circumstances, to carry his burden to show prohibitive cost bars him from arbitrating this claim.

We acknowledge that the Adler court was hesitant to make a final decision on substantive unconscionability on the record that was before it,

¹¹⁵ See Mendez, 111 Wn. App. at 450-52.

notwithstanding Adler's undisputed failure to meet his burden of proof.¹¹⁶ The court, for reasons that it did not explain, remanded to the trial court for further litigation of the question.¹¹⁷

We are not convinced that the same approach is required in this case. Clifford had more than ample opportunity to present sufficient evidence for this challenge below and failed to do so.¹¹⁸ Even if we remanded this case to the trial court for further consideration of the issue of prohibitive cost, further litigation is likely. That would entail discovery and further evidence from Clifford and Avalon on the question of prohibitive cost. It might also include an offer by Avalon to pay all or part of the expenses of arbitration, as Adler indicates.¹¹⁹ Because the question of prohibitive cost has already been extensively litigated both below and on appeal, we conclude that remand for further litigation of the question is not warranted.

Clifford has failed to show that the trial court committed probable error in rejecting the claim that the arbitration agreement is substantively unconscionable due to the fee-splitting provision. It is unnecessary to reach the second prong of RAP 2.3(b) due to his failure to establish this first prong.

¹¹⁶ Adler, 153 Wn.2d at 353-54.

¹¹⁷ Id.

¹¹⁸ See Appellant Avalon Federal Way's Response Opposing Plaintiff Woodall's "Motion for Discretionary Review and Response to the Court's RAP 2.2(A) Motion" at 5 n.3.

¹¹⁹ Adler, 153 Wn.2d at 354.

Procedural Unconscionability

Clifford also argues that the arbitration agreement is procedurally unconscionable. He claims the trial court committed probable error by declining to hold an evidentiary hearing regarding the circumstances surrounding Henry's signing of the arbitration agreement.¹²⁰

Procedural unconscionability is the lack of a meaningful choice.¹²¹ Under Adler, courts look to the circumstances surrounding the transaction at issue to determine whether there was a lack of such choice.¹²² The circumstances include the manner in which the contract was entered, whether each party had a reasonable opportunity to understand the terms of the contract, and whether the important terms were “hidden in a maze of fine print.”¹²³

The existence of an unconscionable bargain is a question of law for the courts.¹²⁴

RCW 7.04A.070(1) directs trial courts to “summarily” decide a motion to compel arbitration:

On motion of a person showing an agreement to arbitrate and alleging another person's refusal to arbitrate pursuant to the agreement, the court shall order the parties to arbitrate if the refusing party does not appear or does not oppose the motion. ***If the refusing party opposes the motion, the court shall***

¹²⁰ Motion for Discretionary Review at 5-9.

¹²¹ Adler, 153 Wn.2d at 345.

¹²² Id.

¹²³ Id. (quoting Nelson v. McGoldrick, 127 Wn.2d 124, 131, 896 P.2d 1258 (1995)).

¹²⁴ Id. at 344.

proceed summarily to decide the issue. Unless the court finds that there is no enforceable agreement to arbitrate, it shall order the parties to arbitrate. If the court finds that there is no enforceable agreement, it may not order the parties to arbitrate.^[125]

The arbitration agreement at issue here stands alone and is not part of another document.¹²⁶ Clifford does not argue that important terms were hidden in a maze of fine print. Thus, there is no question here of important terms being hidden. Moreover, there is no evidence in this record from anyone with personal knowledge of “the manner in which the contract was entered,” the first criterion that Adler specifies for considering the circumstances surrounding the agreement.¹²⁷ Thus, the question here is whether Henry had “a reasonable opportunity to understand the terms of the contract.”¹²⁸

The essence of Clifford’s claim is that there was a “factual dispute regarding Henry Woodall’s capacity [to sign the arbitration agreement],” which required an evidentiary hearing to determine whether the agreement was procedurally unconscionable.¹²⁹ Clifford’s evidence in support of this claim included his declaration and a Declaration of George S. Glass, MD.¹³⁰ The other evidence is a one-page medical records document provided by Avalon to

¹²⁵ (Emphasis added.)

¹²⁶ Clerk’s Papers at 32.

¹²⁷ Adler, 153 Wn.2d at 345.

¹²⁸ See id.

¹²⁹ Motion for Discretionary Review at 6.

¹³⁰ Motion for Discretionary Review, Exs. E, G; Clerk’s Papers at 68, 86.

Woodall.¹³¹

Clifford's declaration states that Henry "was completely deaf from a young age until the time of his death, and the agreement could not have been explained to him verbally because he could not hear."¹³² Clifford's declaration also states that Henry "did not have the mental ability to understand anything he read," and "there is no way that he could have understood a document as complicated as the [arbitration] Agreement on [the date he signed it]."¹³³

Dr. Glass's declaration makes similar conclusions.¹³⁴ Dr. Glass is a physician licensed in Texas, a psychiatrist by training, and "qualified by training and experience to diagnose dementia . . . similar to the mental condition of Henry Woodall."¹³⁵

This declaration is not based on Dr. Glass' personal knowledge of Henry's condition. On the face of the declaration it states that Dr. Glass based his opinion on unspecified medical records of Henry.

The one-page medical record of Henry that is in the record before us shows "Admit Date 10/06/06 3:00 a.m."¹³⁶ It also shows "Admit Dx: . . . Fx Neck

¹³¹ Clerk's Papers at 55, 58.

¹³² Clerk's Papers at 69.

¹³³ Id.

¹³⁴ Clerk's Papers at 86 (Henry "was completely deaf and suffered from dementia and could not have understood this agreement [It] is beyond [Henry's] level of comprehension" given his dementia.).

¹³⁵ Id.

¹³⁶ Clerk's Papers at 58.

of Femur” as the only listed condition at that time.

The same document shows “Current Dx: . . . Dementia . . . Dementia W Behavior Dist.”¹³⁷ But it is unclear when the “Current Dx” information was obtained. For example, the document includes a section that shows “ReAdmitted: 7/09/07 5:30 p.m.” and “Discharged: 7/21/07 1:00 a.m.” Whether the references to dementia existed on July 9, 2007, or some date thereafter is unclear. In short, there was a period of nine months between Henry’s initial admission to the facility in October 2006 and his readmission in July 2007. The document does not show that Henry was diagnosed with dementia when he signed the arbitration agreement on his October 6, 2006, date of original admission.

The trial court decided that the evidence did not show by clear, cogent, and convincing evidence that Henry lacked the capacity to execute the agreement on October 6, 2006.¹³⁸

As to the declaration of Dr. Glass specifically, the trial court’s order states,

the Court . . . decided that if the Declaration . . . were considered, the Declaration contained insufficient foundation both because the facts contained in the document were not before the Court in an admissible form and because the medical conclusion lacked sufficient foundation; therefore, the Declaration was not material to the Court’s inquiry and did not satisfy Plaintiffs’ burden to show by clear, cogent and convincing evidence that Mr. Woodall was legally incompetent to execute the arbitration agreement.^[139]

¹³⁷ Id.

¹³⁸ Clerk’s Papers at 211-12.

¹³⁹ Id.

Clifford does not argue that the trial court abused its discretion by deciding that the lay and medical evidence was insufficient to be material to the court's decision. We see no abuse of discretion.

Clifford claims the court used the wrong standard by deciding that there was no clear, cogent, and convincing evidence to overcome Henry's presumed capacity to sign the agreement on October 6, 2006. But that is the proper standard where the competency of a party to an agreement is challenged.¹⁴⁰ There is insufficient evidence in the record before us that Henry lacked "a reasonable opportunity to understand the terms of the contract," under Adler and other controlling cases.¹⁴¹

Clifford argues that his evidence raised "a fact question" that should have been decided by the Court following an evidentiary hearing. We disagree.

RCW 7.04A.070(1) states that if a party opposes a motion to compel arbitration, the court "shall proceed summarily to decide the issue [of enforceability of the agreement to arbitrate]."

Here, Henry's capacity to agree to arbitrate on October 6, 2006, is a fact question, subject to the presumption that he had capacity at that time. The presumption was subject to being overcome by clear, cogent, and convincing evidence. The court did not abuse its discretion in deciding that there was no

¹⁴⁰ See Page v. Prudential Life Ins. Co. of Am., 12 Wn.2d 101, 108-09, 120 P.2d 527 (1942).

¹⁴¹ See Adler, 153 Wn.2d at 345, 349.

such evidence. Thus, there was nothing left to decide after the summary procedure the court utilized under the statute.

Clifford also claims that RCW 7.04A.070(1) is unconstitutional under article I, section 21 of the state constitution. We need not address this constitutional question at this point and decline to do so. Likewise, we do not address Clifford's additional challenge, raised for the first time in this court, that the arbitration agreement violates RCW 70.129.105.

There was no probable error by the court in following the statutory procedure for deciding the issue of enforceability. Because there was no probable error, we need not address the second prong of RAP 2.3(b).

We conclude that Clifford has failed to establish that the trial court committed probable error with respect to either of the two orders that he designates in his Motion for Discretionary Review. Because of this failure, we deny the motion.

MOTIONS

Avalon moved to dismiss individual plaintiffs Clifford Woodall and Sharon Woodall King under RAPs 2.5(a) and 17.4(d). The heirs do not oppose that motion. We grant the motion.

Avalon also moved to strike the unauthorized surreply of the heirs in the reply brief. The heirs have sought permission of this court to accept their surreply.

RAP 10.1(b) provides that the following briefs may be filed in any review:

(1) a brief of appellant or petitioner, (2) a brief of respondent, and (3) a reply brief of appellant or petitioner. RAP 10.1(c) allows a respondent who is also seeking review to file “a brief in reply to the response the appellant or petitioner has made ***to the issues presented by respondent’s review.***”¹⁴²

This court recently addressed the subject of motions to strike in another context. In Cameron v. Murray,¹⁴³ the trial court granted the defendants’ motion to strike evidence in connection with a motion for summary judgment.

On appeal, Cameron assigned error to that ruling. This court addressed the issue in the following manner:

[Cameron’s] objection is well taken. To begin with, materials submitted to the trial court in connection with a motion for summary judgment cannot actually be stricken from consideration as is true of evidence that is removed from consideration by a jury; they remain in the record to be considered on appeal. Thus, it is misleading to denominate as a “motion to strike” what is actually an objection to the admissibility of evidence that could have been preserved in a reply brief rather than by a separate motion.^[144]

Here, the surreply at issue addresses issues from Avalon’s appeal as a “sur-reply.” This goes beyond the scope of what is allowed under RAP 10.1. But the purpose of Avalon’s motion is more properly directed to this court not considering the pages at issue, not to expunge the pages from the record. Accordingly, we grant Avalon’s motion¹⁴⁵ but only to the extent that we do not

¹⁴² (Emphasis added.)

¹⁴³ 151 Wn. App. 646, 214 P.3d 150 (2009), review denied, 168 Wn.2d 1018 (2010).

¹⁴⁴ Id. at 658.

¹⁴⁵ See also Yousoufian v. Office of Ron Sims, No. 80081-2, 2010 WL

consider the material at the pages identified.

We affirm the trial court's order denying the motion to compel arbitration of the wrongful death claims by the heirs against Avalon.

Cox, J.

WE CONCUR:

Schiveller, J.

Appelwick, J.

1225083, at *11-12 (Wash. Mar. 25, 2010) (granting motions to strike portions of amicus briefs as noncompliant).